"res gestae," the Statute is no defense to an action on the defendant's promise to the creditor to discharge the debtor's obligation. Nevertheless, although this theory would explain recovery to the extent of the defendant's enrichment[16] or of the funds in his hands, it is obvious that it cannot justify recovery on the promise itself, for in spite of the existence of a personal duty the promisor's undertaking may in fact be one of guaranty.

It would seem, therefore, that none of the tests enumerated goes to the essence of the real problem, the substance of the promise, although the courts employing them are careful to assert that their endeavors are directed solely towards its solution.[17] Whether the defendant is a principal debtor, primarily liable, or whether he is liable only in the event of another's default depends alone on his intention[18] and although the nature of the consideration, the motive of the promisor and the object of the contract may be excellent evidence of an intention to assume rather than to answer for another's obligation, they are pertinent only for that purpose and should not themselves be the object of ultimate inquiry.[19] Where the promise is contemporaneous with the creation of the debt, the intention of the parties controls and it should be equally decisive when the promise is to pay an antecedent debt.

Confronted by the problem under consideration, the court in a recent case, *Hurst Hardware Co.* v. *Goodman* (W. Va. 1910) 69 S. E. 898, declared the defendant's promise collateral since it did not appear that his leading object was to benefit himself. As there was no transfer of value from the plaintiff to the defendant the conclusion is in harmony with the tendency of modern decisions, but it is submitted that the result could have been more securely rested on the logical ground that the promisor did not intend to become primarily liable.

THE VENDOR'S DAMAGES IN INSTALLMENT CONTRACTS OF SALE.—In actions brought for the non-acceptance of saleable goods under an executory contract, the orthodox measure of damages is the difference between the contract and market price at the time and place set for performance.[1] This rule has apparently no relation to the doctrine of minimizing damages, but is a necessary consequence of the situation of the parties at the time of breach. As damages in any contract action are designed merely to place the injured party in as favorable a situation as though the contract had been performed,[2] the recovery of a vendor who still has his property is necessarily limited to the excess of the agreed price of the commodity over its present actual value,

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[16]Keener, Quasi-Contracts 279.

[17]See Harburg India Rubber Comb Co. *v.* Martin *supra;* Ames *v.* Foster *supra.*

[18]See Smart *v.* Smart (1885) 97 N. Y. 559; Clark *v.* Howard (1896) 150 N. Y. 232; Birchell *v.* Neaster (1881) 36 Oh. St. 331; Maule *v.* Bucknell (1865) 50 Pa. St. 339; Reed *v.* Holcomb (1863) 31 Conn. 360; Norris *v.* Spencer (1841) 18 Me. 324.

[19]Langdell, Lecture Note 4 Harv. L. Rev. 290. *Cf.* Brown *v.* Weber (1868) 38 N. Y. 187; Browne, Statute of Frauds (5th ed.) § 214.

[1]Unexcelled Fire-Works Co. *v.* Polites (1890) 130 Pa. St. 536; Williston, Sales § 582.

[2]Barnes *v.* Brown (1892) 130 N. Y. 372.

regardless of the vendor's subsequent conduct.[3] Accordingly a resale is significant merely as evidence of market price, depending for its weight upon the seller's diligence in securing the best bargain obtainable.[4] While the corrolary of the rule adopted in New York and elsewhere,[5] that the vendor may sell within a reasonable time on the purchaser's account and sue for the difference between selling and contract price,[6] follows logically from the premise that the vendor may force title on the vendee, it in theory at least inaccurately defines his rights where the common law notion of damages is observed.

The same principles, though modified in their operation by other considerations, are applicable to installment contracts of sale. Where deliveries are to be made at stated intervals, three distinct situations may arise. No difficulty appears in applying the ordinary rule of damages to an actual breach, whether partial or of the whole agreement. Upon an utter refusal by the vendee to perform further, however, the vendor may in most jurisdictions regard the contract as terminated and recover as for a breach of the whole.[7] While this doctrine of anticipatory breach has been said to have no relation to the measure of damages,[8] the proposition thus broadly stated is hardly accurate since another principle, the duty of the plaintiff to minimize loss by all reasonable means, may intervene to prevent the application of the accepted rule of damages. Thus it has been held that a vendor upon repudiation should at once make a forward contract of sale when the market was obviously falling.[9] Again, the doctrine that the plaintiff need not accede to the wrongful refusal but may keep the contract alive for the benefit of both parties,[10] has been largely abrogated through the operation of the same principle. The seller of unmade goods, for example, cannot elect to continue their manufacture after repudiation and then recover any resultant loss,[11] nor can his vendee call thereafter for the completed product.[12] Whether the vendor of goods ready for delivery is entitled by virtue of the theory of election to hold until the time for performance instead of making an advantageous forward sale, seems on principle more doubtful in view of the uncertain nature of such a transaction. As yet the law has not recognized either the duty[13] or the right[14] of the injured party to fix damages by this method; for in this as in other instances, the sole purpose of the court is to make good to the plaintiff the loss of his contract.

[3]Chapman *v.* Ingram (1872) 30 Wis. 290; Ridgeley *v.* Mooney (1896) 16 Ind. App. 362.

[4]Gehl *v.* Milwaukee Produce Co. (1903) 116 Wis. 263.

[5]Hayden *v.* Demets (1873) 53 N. Y. 426; Williston, Sales § 562.

[6]Dustan *v.* McAndrew (1870) 44 N. Y. 72.

[7]See Roper *v.* Johnson (1873) L. R. 8 C. P. 167; L. S. & M. S. Ry. Co. *v.* Richards (1894) 152 Ill. 59.

[8]Roper *v.* Johnson *supra.*

[9]Roth *v.* Taysen (1896) 73 L. T. [N. S.] 628.

[10]Frost *v.* Knight (1872) L. R. 7 Exch. 111, 112.

[11]Tufts *v.* Weinfeld (1894) 88 Wis. 647; *contra* Roebling's Sons Co. *v.* Lock Stitch Fence Co. (1889) 130 Ill. 660. The same rule applies to the vendor of goods not procured at the time of renunciation. Danforth *v.* Walker (1864) 37 Vt. 239.

[12]Ault *v.* Dustin (1898) 100 Tenn. 366.

[13]See Missouri Furnace Co. *v.* Cochran (1881) 8 Fed. 463.

[14]Kadish *v.* Young (1883) 108 Ill. 170.

For somewhat distinct reasons, it is submitted that the same purpose should govern in actions on contracts providing for installments of payment prior to delivery. If suit is brought after the time set for delivery, despite the fact that the vendor has broken his promise to make certain payments as well as to accept the goods tendered, the inquiry before the court is again the extent of the seller's injury. A recovery of back installments where tender has been made or waived could therefore be justified only by construing the promise to make such payments as a distinct obligation enforceable quite independently of the other terms of the agreement.[15] It seems preferable, however, to regard the unpaid installments as merely purchase-money,[16] and from this point of view the stipulation for their payment before delivery should not entitle a vendor who retains possession to more than the usual damages.[17] *A fortiori,* it would seem, the vendee's default in making tender should not enlarge his recovery.

A different consequence might well follow, however, if an action for such installments were brought before the time set for delivery. At the time of suit the vendor is presumably damaged by the vendee's default to the extent of the installments then due. Hence, even if the vendee's breach was accompanied by an attempted repudiation of the whole agreement, it is conceived that the vendor, under his privilege of standing on the contract, might recover installments as they fall due without delaying suit until the time for an actual tender and refusal. Such a result, however, must rest for its justification on the assumption that the contract will yet be performed on both sides, and hence that the seller is merely recovering as damages part of the consideration for his future performance. Otherwise, no reason is seen for departing from the usual measure of damages. The question of the theory underlying such a recovery was squarely raised by a recent Oregon case. *Livesley et al.* v. *Krebs Hop Co.* (Ore. 1910) 112 Pac. 1. The purchaser of hops under an installment contract calling for quarterly advance payments for each installment refused to perform further.[18] The seller at once sued for two payments then due and recovered judgment. While that action was pending, the time for the corresponding delivery of hops arrived, the market price then exceeding the contract price. The vendor made no tender but held the hops six months and sold them when the market price had dropped one half. In an action brought by the vendee to restrain the enforcement of the judgment, the court held that no injunction should issue. Admitting that tender was dispensed with as nugatory by the vendee's continuing refusal to perform,[19] a conclusion denied by the dissenting opinion, the vendee's failure to take the goods amounted to a breach at the date set for delivery. In view of the market price then and later, obviously the vendor's injury in legal contemplation resulted, not from the breach,

[15]Such a construction in contracts for the sale of lands, Sibthorp *v.* Brunel (1849) 3 Exch. 826, is apparently responsible for the rule that the vendor can recover back installments without tendering a deed. Loud *v.* Pomona Land and Water Co. (1894) 153 U. S. 564; *contra* Beecher *v.* Conradt (1855) 13 N. Y. 108.

[16]See Foos *v.* Sabin (1877) 84 Ill. 564.

[17]See Tufts *v.* Bennett (1895) 163 Mass. 398; Brooke *v.* Laurens Milling Co. (S. C. 1909) 66 S. E. 294.

[18]Krebs Hop Co. *v.* Livesley (Ore. 1907) 92 Pac. 1084.

[19]Cort & Gee *v.* Ambergate, etc. Ry. Co. (1851) 17 Q. B. 127; Stokes *v.* Mackay & De Castro (1895) 147 N. Y. 223.

but solely from his own voluntary retention of his property. Hence it seems that while the legal judgment, without reference to the New York rule of damages, was properly rendered, circumstances occurring prior to its rendition yet too late to be pleadable in that action, disentitled the vendor to substantial damages unless on the somewhat violent assumption that title to the growing hops was meant to pass without delivery. The consequent impropriety of enforcing a substantial judgment is obvious. Therefore in spite of the vendor's apparent good faith the injunction should have issued.[20] For if damages in contract actions are designed to recompense the plaintiff for his actual injury, it is clearly inequitable to permit their recovery where by rule of law no injury has been caused by the breach.

RAILWAY RIGHTS IN CITY STREETS UNDER STATE FRANCHISES.—The rights of railway companies in the streets of a city, which according to the better view are to be considered franchises,[1] have been variously described as easements,[2] licenses,[3] and contracts.[4] The confusion of such an interest with a license[5] results from the similarity between the two, which is especially apparent in a jurisdiction where the operation of a street railway is recognized as an ordinary street use and thus as within the regulatory power of the municipality.[6] On the other hand, the right resembles an easement in gross in its character of a right of way[7] which has been created for the benefit of an individual rather than for that of a dominant estate, and, from its origin in an agreement between the State and the grantee, assumes the peculiarities of a contract[8] and hence is within the protection of the Federal Constitution.[9] It differs, however, both in its origin and in its legal characteristics from either a license, an easement, or a

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[20]Equity has frequently enjoined a judgment when a subsequent change of conditions renders its enforcement unconscionable. N. Y. & Harlem R. R. Co. *v.* Haws (1874) 56 N. Y. 175; Walker *v.* Heller (1883) 90 Ind. 198; Bassett *v.* Henry (1889) 34 Mo. App. 548.

[1]Blair *v.* Chicago (1905) 201 U. S. 400; People *v.* O'Brien (1888) 111 N. Y. 1; Fanning *v.* Osborne (1886) 102 N. Y. 441; *cf.* Hatfield *v.* Strauss (1907) 189 N. Y. 208.

[2]Mayor, etc., of Knoxville *v.* Africa (1896) 77 Fed. 501; Railroad Co. *v.* Town of Alston (1904) 54 W. Va. 597.

[3]Mayor, etc., of the City of Troy *v.* Troy & Lansingburgh R. R. Co. (1872) 49 N. Y. 657.

[4]See Mayor, etc., of New York *v.* Second Ave. R. R. Co. (1865) 32 N. Y. 261; City of Binghamton *v.* B. & P. D. Ry. Co. (N. Y. 1891) 61 Hun. 479.

[5]See Union Traction Co. *v.* Chicago (1902) 199 Ill. 484.

[6]C. B. & Q. R. R. Co. *v.* Street R. R. Co. (1895) 156 Ill. 355.

[7]See People *v.* O'Brien *supra;* Milhau *v.* Sharp (1863) 27 N. Y. 611; Citizens Street Ry. Co. *v.* Common Council (1901) 125 Mich. 673.

[8]Brooklyn Central R. R. Co. *v.* The Brooklyn City R. R. Co. (N. Y. 1860) 32 Barb. 358; 7 COLUMBIA LAW REVIEW 414; *cf.* Lorain Steel Co. *v.* Norfolk, etc. Street Ry. (1905) 187 Mass. 500.

[9]Wilmington R. R. Co. *v.* Reid (1871) 13 Wall. 264; Mayor, etc., of New York *v.* Second Ave. R. R. Co. *supra;* City of Binghamton *v.* B. & P. D. Ry. Co. *supra.*